

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
VARIANCE PERMIT DENIED BY
MASON COUNTY TO DONALD W.
and MARJORIE SCHUMSKY,
DONALD W. and MARJORIE
SCHUMSKY,

Appellants,

v.

MASON COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

SHB No. 83-11

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a shoreline variance denial of a deck addition by Mason County, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, presiding, Nancy Burnett, Richard A. O'Neal, David Akana, and Gayle Potthrock, on November 8, 1983, at Lacey, Washington. The proceedings were officially reported by Kim Otis and were also electronically recorded.

1 Appellants Donald and Margorie Schumsky were represented by
2 R. Bruce Harrod. Respondent Mason County was represented by John
3 Buckwalter, and co-respondent Department of Ecology was represented by
4 Assistant Attorney General Patricia H. O'Brien.

5 Witnesses were sworn and testified. Exhibits were admitted and
6 reviewed and oral argument was heard. Two motions were heard and each
7 denied. From the testimony, evidence and argument the Board makes
8 these

9 FINDINGS OF FACT

10 1

11 The subject development is a deck located in Mason County on the
12 south shore of Hood Canal approximately five miles northeast of Union
13 on Highway 106. The local shorelines master program designation of
14 the area is urban; Hood Canal itself is a shoreline of statewide
15 significance as designated in the Shorelines Management Act. Lots on
16 either side of the lot are currently vacant. Nearby lots are
17 developed.

18 II

19 Appellants seek a variance for their existing waterward
20 trapezoid-shaped deck which they built without a permit. The deck
21 measures 13' x 19' x 18' x 18', equaling 300 square feet in surface
22 area. It extends 18 feet waterward of the existing bulkhead. Just
23 one piling supports the portion of the deck that is over water. The
24 remainder of the subject deck lies landward between the bulkhead and
25 the residence to which it is attached.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
SMB No. 83-11

III

Mason County issued a permit to the appellants in July of 1980 for the construction of an 80-foot pile pier, gangway, and float on this same property. The permit did not include a deck or any other residential addition. The appellants built the permitted pier in the fall of 1981, and then added the waterward deck during the following spring. Appellants claim the deck addition was partly embarked upon to replace some deteriorating timbers and that an unidentified public official in Shelton advised them such a deck addition would be permissible.

IV

Mason County officials discovered the unauthorized deck in summer of 1982 and notified appellants that a variance was required if the deck were to continue to exist. Appellants applied for a shoreline variance on August 25, 1982, from the Mason County Commissioners.

V

Appellants have owned and used the property since 1972. Attached to the residence is a floating pier which provides moorage and water access. Appellants currently have reasonable use of their property without the unauthorized deck.

VI

The Mason County Shorelines Advisory Board recommended denial of appellants' application for a variance. The Mason County Commissioners agreed and rejected the variance application, although they did not issue any findings of fact or state any particular

1 supporting reasons on the record. (A custom now being followed by
2 most Washington counties and cities for shoreline area permits is the
3 issuance of findings and conclusions, written or oral.)

4 VII

5 Any Conclusion of Law which should be deemed a Finding of Fact is
6 hereby adopted as such.

7 From these Findings the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 The Shorelines Hearings Board reviews applications for shoreline
11 permits on a de novo basis, conscious, of course, that the burden of
12 proof is on the appellant; it does not review local government
13 decisions only to determine if such decisions were arbitrary and
14 capricious or clearly erroneous.

15 II

16 The Mason County Shoreline Master Plan (MCSMP) prohibits
17 residential structures within the shoreline setback and waterward of
18 the ordinary high water mark (OWHM).

19 The MCSMP defines "structure":

20 Structure means anything constructed, erected, or
21 located on the ground or water, or attached to the
22 ground or to an existing structure, including but not
23 limited to residences, apartments, barns, stores,
24 offices, factories, sheds, cabins, mobile and
25 floating homes, and other buildings.

26 The subject deck is attached to appellants' residence and
27 supported over the water. Because of its location and configuration,

1 appellants' deck falls within the MCSMP definition of a structure. As
2 a structure, provisions that regulate the same apply to it. Calling
3 the structure a "dock" or part of the "pier" will not change its
4 character nor will it cause provisions that are only applicable to
5 "piers" to be applicable to "decks."

6 The MCSMP provides shoreline setbacks for residential structures:

7 Setbacks - the minimum setback for buildings shall be
8 15 feet from the line of ordinary high water,
9 provided that structures shall not extend beyond the
10 common line of neighboring structures, and new
construction shall not substantially reduce the view
of the neighboring structures.
(Section 7.20.010(c))

11 Variances are required for any structure to exist within the
12 shoreline setback area. Appellants' deck is a structure that requires
13 a variance because it lies within the 15-foot shoreline setback and
14 extends out past the OWHM. MCSMP 7.16.200 The deck must meet MCSMP
15 variance criteria before the deck can be allowed to remain. The MCSMP
16 allows variances to be granted under the following criteria:

17 Variances deal with specific requirements of this
18 ordinance and the objective is to grant relief when
19 there are practical difficulties or unnecessary
20 hardships in the way of carrying out the strict
21 letter of this ordinance. The property owner must
22 show that if he complies with the provisions, he
23 cannot make any reasonable use of his property. The
fact that he might make a greater profit by using his
property in a manner contrary to the intent of the
ordinance is not a sufficient reason for a variance.
A variance will only be granted after the applicant
can demonstrate the following:

24 A) The hardship which serves as a basis for the
granting of a variance is specifically related to the
property of the applicant.

25 B) The hardship results from the application of

1 the requirements of the Shoreline Management Act and
2 this ordinance, and not from, for example, deed
restrictions or the applicant's own actions.

3 C) The variance granted will be in harmony with
the general purpose and intent of this ordinance.

4 D) Public welfare and interest will be
5 preserved; if more harm will be done to the area by
granting the variance than would be done to the
6 applicant by denying it, the variance will be denied.
MCSMP Section 7.28.020.

7 III

8 To prevail, appellant must show that without the
variance, he cannot make any reasonable use of his
9 property. If he cannot do so, the application must
be denied. If he can do so, he must also prove that
10 the proposal meets the requirements of Section
7.28.020(A, B, C, & D).
11 Drake v. Mason County, SHB No. 83-4.

12 In addition to proving preclusion from a reasonable use of the
13 property, appellants must prove that their alleged hardship is
14 specifically related to the property.

15 Here, the appellants built a structure in the setback area partly
16 to replace some deteriorating timbers and partly to secure an addition
17 and enjoy an enlarged platform area. The deck addition merely
18 expanded the area for enjoyment. The denial of a variance would not
19 prevent a reasonable use of the property.

20 IV

21 Next, appellants must prove that they will suffer a hardship if
22 the variance is denied. In the instant case, appellants claim a
23 hardship because of they will be compelled to remove the deck unless
24 they are granted a variance. Their alleged hardship stems only from
25 their own actions and not from the property or the SMA. Hardships

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
SHB No. 83-11

which result from appellant's own doing are not reasons for a variance

V

Those who seek variances must also prove that their proposed structures are in harmony with the surrounding area and are within the intent of the ordinance. Photos of nearby and more distant over-the-water structures were presented by appellants to show that their structure is generally in harmony with the surrounding area. Although over-the-water structures do exist in the area, most of them predate the SMA or the enactment of the MCSMP. While the subject deck addition strikes no apparent disharmony in the surrounding area, the proposed addition does not meet the intent of the ordinance (the MCSMP). That intent prohibits a residential deck within the setback area and over water. Accordingly, the development is inconsistent with MCSMP 7.28 020(c).

VI

Appellants must also meet criteria (D). Upon examining the evidence, the Board finds the deck to set an undesirable precedent under the MCSMP for construction past the OWHM and within the shoreline setback line. Granting a variance for this deck would establish an undesirable (and unlawful) precedent for the granting of requests for similar decks. The cumulative impact of many over-the-water decks would be precisely what the SMA was enacted to prevent: piecemeal and uncoordinated development. RCW 90.58.020.

VII

Hood Canal is a shoreline of statewide significance (SSWS).

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
SHB No. 83-11

1 development on a SSWS should especially reflect statewide interests of
2 planned development. RCW 90.58.020. The MCSMP reflects Mason
3 County's planning for this special shoreline. A variance in this
4 instance would be contrary to the public interest of the MCSMP.

5 VIII

6 All MCSMP variance criteria must be met before a variance may be
7 granted. Appellants have failed to show that their deck meets any of
8 the variance criteria. Accordingly, Mason County's denial of the
9 variance should be affirmed.

10 IX

11 Any Finding of Fact which should be deemed a Conclusion of Law is
12 hereby adopted as such.

13 From these Conclusions the Board enters this
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ORDER

The instant variance application decision by the Mason County
Commission is affirmed.

DATED this 21st day of December, 1983

SHORELINES HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

Nancy R. Burnett
NANCY R. BURNETT, Member

Richard A. O'Neal
RICHARD A. O'NEAL, Member

See dissenting opinion
LAWRENCE J. FAULK, Member

1 DISSENTING OPINION - LAWRENCE J. FAULK

2 In the Spring of 1981, appellant discovered dry rot on the
3 existing deck. Appellant thereupon replaced the existing deck and
4 extended the deck approximately 18 feet to the north and behind the
5 existing deck.

6 This was accomplished without obtaining a building permit or
7 shorelines approval, although appellant testified that he obtained
8 verbal approval from Mason County.

9 In the Fall of 1982, the deck was discovered by the Corps of
10 Engineers. On October 15, 1982, DOE indicated they had no objection
11 to issuance of a Corps Section 10 Permit to appellant.

12 On November 18, 1982, appellant applied for a shoreline variance
13 from the Mason County Shoreline Master Program (MCSMP). On December
14 23, 1982, the Mason County Shorelines Advisory Board recommended
15 denial of appellant's application.

16 On January 24, 1983, the Mason County Commissioners agreed and
17 rejected appellant's application. On March 3, 1983, appellant
18 appealed to this Board within the 30 days allowed from the time DOE
19 recieved the decision of the commissioners. The case was heard on
20 November 8, 1983, by the Shorelines Hearings Board.

21 The deck is compatible with existing structures and uses in the
22 area. The appellant showed there are "practical difficulties and
23 unnecessary hardships in carrying out the strict letter of the
24 ordinance, as the majority would have him do. (Variance Section
25 MCSMP.) The practical effect of denying the variance is to possibly
26

1 force the appellant to tear down the 18' deck extension. This is not
2 a reasonable remedy in my opinion and represents an unnecessary
3 hardship on the appellant.

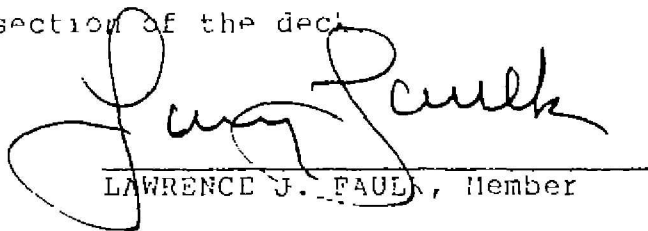
4 The cumulative impact of granting this variance, where a lot has
5 already been developed for residential use under proper authority as
6 has this lot, would be small because the area on the south shore of
7 Hoods Canal has already been heavily developed, under proper or
8 improper authority, as the photographs (Exhibit A-5) indicated

9 The evidence shows the deck is not visible from the highway so it
10 does not obstruct the view of passers by who are visiting the area.
11 Because appellant owns both lots on either side of subject property
12 the deck does not obstruct the view of adjacent lots, as the majority
13 seems to indicate. Finally there are other developments that extend
14 further into the water on either side of appellant's lots.

15 Be that as it may, I think we, as a Board have a duty to interpret
16 and apply the statutes in a manner that furthers justice.

17 Other people in the area enjoy the use of similar structures. I
18 can see no reason to deny appellant the rightful use of his property.

19 I believe appellant did meet the hardship criteria for granting a
20 variance and therefore disagree with the majority decision and believe
21 the Board should reverse the County's decision and grant the variance
22 for this already constructed section of the deck.

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LAWRENCE J. FAULK, Member

26 DISSENTING OPINION
27 LAWRENCE J. FAULK
SHB NO. 83-11